

ESTTA Tracking number: **ESTTA627396**Filing date: **09/16/2014**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

**Opposer Information**

Name	NEW WAVE INNOVATIONS, INC.
Granted to Date of previous extension	09/17/2014
Address	502 North School Street LODI, CA 95204 UNITED STATES
Correspondence information	John H. Faro, Esq. Attorney for New Wave Innovations Faro & Associates 1395 Brickell Avenue Suite 800 Miami, FL 33131 UNITED STATES JOHNF75712@AOL.COM Phone:305-761-6921

**Applicant Information**

Application No	86108666	Publication date	05/20/2014
Opposition Filing Date	09/16/2014	Opposition Period Ends	09/17/2014
Applicant	Mr. Foamer, Inc. 164 Barbados Drive Jupiter, FL 33458 UNITED STATES		

**Goods/Services Affected by Opposition**


Class 003. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: car wash cleaning and polishing preparations
Class 035. First Use: 2012/08/10 First Use In Commerce: 2012/08/10 All goods and services in the class are opposed, namely: Online retail store services featuring car wash equipment and parts thereof
Class 037. First Use: 2013/11/02 First Use In Commerce: 2013/11/02 All goods and services in the class are opposed, namely: installation and maintenance of car wash equipment and parts thereof

**Grounds for Opposition**

False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)
<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)

Other	Registration is barred under doctrine of Quasi Estoppel
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### Mark Cited by Opposer as Basis for Opposition

U.S. Application No.	86304665	Application Date	06/09/2014
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	MR. FOAMER		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 035. First use: First Use: 2011/12/15 First Use In Commerce: 2011/12/15 Online retail store services featuring car wash equipment and parts thereof		

Related Proceedings	Tm Application SN 86/304,665 Tm Application SN 86/303,800
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Attachments	86304665#TMSN.png( bytes ) TmOppLessExhibits.pdf(1632853 bytes ) OppExhibit1.pdf(2084856 bytes ) OppExhibit2.pdf(2308099 bytes ) OppExhibit3.1.pdf(2345750 bytes ) OppExhibit4.pdf(1262131 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by USPS Express Mail Post Office to Addressee on this date.

Signature	/John H. Faro/
Name	John H. Faro, Esq.
Date	09/16/2014

*Law Offices*  
**FARO & ASSOCIATES**  
1395 Brickell Avenue – Suite 800  
Miami, Florida 33131

*John H. Faro\**

*\*Registered Patent Attorney*

*Telephones: (305) 761-6921*

*Facsimile: (305) 726-0029*

September 15, 2014

MS: TTAB  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

Dear Sir/Madam:

*Re: New Wave Innovations, Inc. v. Mr. Foamer, Inc.*  
*Opposition by New Wave Innovations, Inc. ("NWI")*  
*Mark: Mr. Foamer*  
*Application Ser. No. 86/108,666'*  
*Date of First Use: August 2012*

FACTUAL BASIS FOR OPPOSITION

1. New Wave Innovations, Inc. has applied for registration of the Mr. Foamer mark as a service mark for its distribution of commercial car wash products. Each of these applications were filed on or about June 19, 2014, SN 86/304,665 & SN 86/303,800, filing receipts annexed hereto as **Exhibits "1" & "2"**. The NWI date of first use is November/December 2011, which is prior in time to the date of first use alleged in *Application Ser. No. 86/108,666*
2. Both NWI and Mr. Foamer, Inc., are competitors; and, each manufacture and distribute commercial car wash foam generators, and accessory product, which are virtually indistinguishable from one another. There has and continues to exist confusion, including specifically reverse confusion between these companies, and their respective products.
3. On or about July 16, 2013, NWI has sued Mr. Foamer et al in the Federal District Court for the Southern District of Florida, *New Wave Innovations, Inc. v. James (Jim) McClimond*, Case No. 2013-CV-22541. The claims asserted against Mr. Foamer et al, include unfair competition based upon unfair competition, trade secret theft, common law trademark and trade dress infringement. Copy of Amended (current) Complaint annexed hereto as **Exhibit "3"**.

4. On or about October 29, 2013, the District Court conducted an evidentiary hearing on a NWI Motion for Preliminary Injunction. The Defendants (Mr. Foamer, Inc.) put on a classic “fair use” defense – e.g. the NWI Mr. Foamer mark was merely descriptive, lack any secondary meaning within the trade and had never been used by any of the Defendants, including Mr. Foamer, Inc. in association with any of the products or services of his company, See *Kelly-Brown v. Winfrey* Docket No. 12-1207-cv (Decided Dec. 31, 2103) 2nd Cir., 2013, for more detailed discussion of defense.
5. In support of this “fair use” defense, the Jim McClimond, the founder and corporate representative of Mr. Foamer, Inc.,
  - a. filed an affidavit in Opposition to the Plaintiff’s Motion for Preliminary Injunction in which he stated under oath that Mr. Foamer, Inc. **has not used the terms** “Mr. Foamer”, in connection with the sale of a product (Affidavit of McClimond, DE 50-1 @ 13 – annexed hereto as **Exhibit “3”**

Paragraph 13 of the McClimond Affidavit states in unequivocal terms

**13. Mr. Foamer does not use a trademark containing the terms MR. FOAMER in connection with the sale of any product**

- b. testified, under oath, that that Mr. Foamer, Inc. **has not used** the **terms** “Mr. Foamer”, in connection with the sale of products, Hearing on October 29, 2013, Tx @ page 217 @ line 5-8; & page 219, lines 5-7, - annexed hereto as **Exhibit “4**
6. Notwithstanding the prior representations, under oath, in the pending Federal District Court litigation involving the parties, Applicant filed a Federal application (Serial No. 86/108,666) with the US Trademark Office seeking Federal Registration of the terms “Mr. Foamer” for **“car wash cleaning & polishing preparations”** and for **“sale of car wash equipment and parts thereof, including sale of equipment to others”**, in direct contradiction of the McClimond Affidavit and testimony before the Federal District Court.
7. Notwithstanding the NWI requests for production of documents to Mr. Foamer, Inc. in the pending Federal District Court litigation involving the parties, Mr. Foamer, Inc. did not produce any document manifesting any trademark usage of the MR., FOAMER mark. Only now has Applicant produced and submitted an exemplar in support of registration illustrating, Mr. Foamer, Inc. use in commerce, wherein the Mr. Foamer mark is illustrated with the “tm” superscript. This exemplar was either withheld during discovery and thereby concealed from the Court at the time of the hearing on the NWI Motion for Preliminary Injunction, because of its obvious conflict with the “fair use” defense to trademark infringement; and alternatively, was created after the October 29, 2013, for sole purpose of support the subject registration.



8. NWI has, since the discovery of the Mr. Foamer, Inc. trademark application, filed a *Motion to Strike* its pleadings in the litigation before the Federal District Court, based upon the apparent misconduct before the Federal District Court, Motion to Strike annexed hereto as **Exhibit “5”**

#### BASIS OF OPPOSITION

A. The verified statements contained in the Mr. Foamer, Inc. trademark *Application Ser. No. 86/108,666*, are fraudulent. There was no use of the MR. FOAMER mark by the applicant in August 2012, based upon its sworn testimony before the Federal District Court. The exemplar use in support the trademark *Application Ser. No. 86/108,666*, was fabricated after October 29, 2013, solely for the purposes of filing an application for registration.

B. The Mr. Foamer, Inc. trademark *Application Ser. No. 86/108,666*, is barred from registration by the equitable doctrine of Quasi Estoppel, *County School Bd. of Henrico County, Virginia. v. RT, a minor, et al.*, 433 F.Supp.2d 692, 705 (E.D. Va., 2006)

In general, modern courts have held that quasi-estoppel applies when the offending party takes a different position than his or her original position, and, either the offending party gains an advantage or causes a disadvantage to the other party; the other party is induced to change positions; or, it would be unconscionable to permit the offending party to maintain an inconsistent position from which it has already derived a benefit or in which it has acquiesced. See, e.g., *Atwood v. Smith*, \_\_\_ P.3d \_\_\_ (Idaho 2006), 2006 WL 1420821, \* 3 (not yet released for official publication). As compared to equitable estoppel, quasi-estoppel does not require a showing of detrimental reliance. Instead, there must only be evidence that it would be unconscionable to permit the offending party to assert the allegedly contrary positions.<sup>24</sup>

As applicable to the facts of this case, Mr. Foamer, Inc. is bound by its representations, under oath, before the United States Federal District Court, in its “fair use” defense of the NWI claims for trademark infringement, specifically, that it had not used the “MR. FOAMER”, as a trademark, as of the date of the hearing on Motion for Preliminary Injunction (October 29, 2013). Such estoppel further reinforces the NWI contention that the exemplar submitted in support of its registration was created after October 29, 2013.

C. There has been actually confusion between the Applicant's use of the MR. FOAMER mark and the NWI use of the MR. FOAMER mark. More specifically, at least one individual who received the NWI Christmas card and solicitation in 2011, went on-line searching for NWI products associated with the MR. FOAMER mark, and ordered what he believed to be NWI products from Mr. Foamer, Inc., only realizing his error after the Mr. Foamer, Inc. product was delivered, and closely compared to the NWI literature.

D. There has been actual confusion between the Mr. Foamer, Inc., products and NWI products, Mr. Foamer, Inc., products having been returned to NWI for repair or replacement

E. There has been "reverse" confusion between the Applicant's use of the MR. FOAMER mark and the NWI use of the MR. FOAMER mark. More specifically, NWI customers have questioned the NWI use of the MR. FOAMER mark, because of their mistaken belief that the MR. FOAMER mark belonged to Mr. Foamer, Inc.

### **VERIFICATION**

I am authorized to represent the New Wave Innovations, Inc. in this Opposition to the registration of the MR. FOAMER mark, and to execute this verification, under 28 USC 1001, et seq, and herein verify the factual statements made herein are truthful and accurate and where based upon information and belief, the foregoing statements are believed to be accurate.

/John H. Faro/

Exhibit “1”

Trademark Electronic Application System (TEAS) filing receipt

1. **YOUR MARK:** MR. FOAMER (Standard Characters, mark.jpg)  
The literal element of the mark consists of MR. FOAMER.  
The mark consists of standard characters, without claim to any particular font, style, size, or color.
2. **YOUR SERIAL NUMBER:** We have received your U.S. Trademark Application and assigned serial number '86304665' to your submission. A summary of your application data is provided at the bottom of this message and serves as your official filing receipt. Please keep a copy of this information for your records. All correspondence concerning the application should reference your assigned serial number.  
Please read all of the important information below. Not every mark is registrable with the USPTO and we do not refund the application filing fee(s) if a registration does not ultimately issue.
3. **RECEIVING E-MAIL COMMUNICATIONS/FILING DOCUMENTS ON-LINE:** If you have authorized receipt of correspondence by e-mail, please make sure that your server will accept USPTO e-mail and not treat it as SPAM. If you have not authorized communication by e-mail, please do so at any time by using the "Change of Correspondence Address" form, available at <http://www.uspto.gov/trademarks/teas/correspondence.jsp>. If you must submit correspondence to us, please use the Trademark Electronic Application System (TEAS) forms, available at <http://www.uspto.gov/trademarks/teas/index.jsp>.
4. **KEEP YOUR ADDRESS CURRENT IN USPTO RECORDS:** We do not extend filing deadlines due to a failure to receive USPTO mailings/e-mailings. You must update the correspondence and/or owner's address if a postal address and/or e-mail address changes, using the form(s) available at <http://www.uspto.gov/trademarks/teas/correspondence.jsp>.
5. **WARNING ABOUT UNSOLICITED COMMUNICATIONS:** You may receive trademark-related communications from private companies not associated with the USPTO. These communications frequently display customer-specific information, including your USPTO serial number or registration number and owner name, and request fees for trademark-related services, such as monitoring, listings in international publications, and document filing. None of the companies offering these services are affiliated with the USPTO or any other federal agency. All official correspondence will be from the "United States Patent and Trademark Office" in Alexandria, VA, and if by e-mail, specifically from the domain "@uspto.gov." Please consult the "Warning" page on the Trademarks section of the USPTO's website for further information about unsolicited communications and to view representative examples of them. For general information on filing and maintenance requirements for trademark applications and registrations, including fees required by law, please consult [www.uspto.gov](http://www.uspto.gov), contact the [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or telephone 1-800-786-9199.
6. **LEGAL EXAMINATION PROCESS:** Your application is now pending examination. In approximately 3 months, your application will be assigned to a USPTO examining attorney for review. The application cannot mature into a registration unless all legal requirements are met, and many applications never satisfy these requirements and therefore never register. The overall

process can take up to 18 months.

7. **CHECK STATUS AND REVIEW DOCUMENTS OR YOUR APPLICATION MAY BE UNINTENTIONALLY ABANDONED:** You must check the status and review all documents associated with your application at least every 3-4 months using Trademark Status and Document Retrieval (TSDR), available at <http://tsdr.uspto.gov/>. Promptly e-mail the [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or telephone 1-800-786-9199 (select option #1) if an Office action (letter from the USPTO) or notice has issued for your application that you did not receive or do not understand. Failure to respond timely to any Office action or notice may result in the abandonment of your application, requiring you to pay an additional fee to have your application revived even if you did not receive the Office action or notice.
8. **FILING ERRORS:** If you discover an error in the application data, you must file a Voluntary Amendment at <http://www.uspto.gov/trademarks/teas/miscellaneous.jsp>. Do not submit any proposed amendment to [TEAS@uspto.gov](mailto:TEAS@uspto.gov), because the TEAS technical support team may not make any data changes. Please wait approximately 7 days after the filing date of your application to submit a Voluntary Amendment in order to allow for initial upload of your application data into the USPTO database. The assigned examining attorney will determine the acceptability of any Voluntary Amendment during examination. Not all errors may be corrected. For example, if you submitted the wrong mark or if the proposed correction would be considered a material alteration to your original filing, it will not be accepted. In this situation, your only recourse would be to file a new application, with a new fee and no refund of your original filing fee.
9. **REQUEST FOR REFUND AND/OR CANCELLATION:** Since your application has already been assigned a serial number, please do not contact [TEAS@uspto.gov](mailto:TEAS@uspto.gov) to request a refund or to cancel the filing. We will only cancel the filing and refund the filing fee if the application does not meet minimum filing requirements. The fee is a processing fee that the USPTO does not refund, even if your mark does not proceed to registration.  
In the limited situation where you inadvertently filed identical applications, one immediately after the other, because no confirmation of the first filing was received, please provide both serial numbers to the technical support team at [TEAS@uspto.gov](mailto:TEAS@uspto.gov).
10. **SelectUSA:** The United States represents the largest, most dynamic marketplace in the world and is an unparalleled location for business investment, innovation, and commercialization of new technologies. The U.S. offers tremendous resources and advantages for those who invest and manufacture goods here. Through SelectUSA, our nation works to promote and facilitate business investment. SelectUSA provides information assistance to the international investor community; serves as an ombudsman for existing and potential investors; advocates on behalf of U.S. cities, states, and regions competing for global investment; and counsels U.S. economic development organizations on investment attraction best practices. To learn more about why the United States is the best country in the world to develop technology, manufacture products, deliver services, and grow your business, visit [SelectUSA.gov](http://SelectUSA.gov) or call +1-202-482-6800.

### **SUMMARY OF APPLICATION DATA FOLLOWS:**

#### **APPLICATION DATA: Trademark/Service Mark Application, Principal Register**

The applicant, NEW WAVE INNOVATIONS, INC, a corporation of Florida, having an address of  
C/O FARO & ASSOCIATES,

1395 BRICKELL AVENUE - SUITE 800  
MIAMI, Florida 33131  
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

International Class 035: Online retail store services featuring car wash equipment and parts thereof.

In International Class 035, the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as 12/15/2011, and first used in commerce at least as early as 12/15/2011, and is now in use in such commerce. The applicant is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) Christmas Card With Company Mascot - Cartoon Character Corresponding to Product Configuration With Christmas Holiday Garb - Discount coupon included in card for New Wave Innovation, Inc. products.

Specimen-1 [SPE0-9823848233-191724805\_.2011\_Chistmas\_Card\_Specimen.jpg ]

For informational purposes only, applicant's website address is: [www.Faro-Law.com](http://www.Faro-Law.com)

The applicant's current Attorney Information:

JOHN H. FARO, ESQ of FARO & ASSOCIATES  
1395 BRICKELL AVENUE - SUITE 800  
MIAMI, Florida 33131  
United States

The applicant's current Correspondence Information:

JOHN H. FARO, ESQ  
FARO & ASSOCIATES  
1395 BRICKELL AVENUE - SUITE 800  
MIAMI, Florida 33131  
305-761-6921(phone)  
305-726-0029(fax)  
Johnf75712@aol.com;Johnf75712@aol.com (authorized)

A fee payment in the amount of \$325 has been submitted with the application, representing payment for 1 class(es).

#### **Declaration**

The signatory believes that: if the applicant is filing the application under 15 U.S.C. Section 1051(a), the applicant is the owner of the trademark/service mark sought to be registered; the applicant or the applicant's related company or licensee is using the mark in commerce on or in connection with the

goods/services in the application, and such use by the applicant's related company or licensee inures to the benefit of the applicant; the specimen(s) shows the mark as used on or in connection with the goods/services in the application; and/or if the applicant filed an application under 15 U.S.C. Section 1051(b), Section 1126(d), and/or Section 1126(e), the applicant is entitled to use the mark in commerce; the applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the goods/services in the application. The signatory believes that to the best of the signatory's knowledge and belief, no other person has the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion or mistake, or to deceive. The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements and the like may jeopardize the validity of the application or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true and all statements made on information and belief are believed to be true.

#### **Declaration Signature**

Signature: /JOHN H. FARO/ Date: 06/09/2014

Signatory's Name: JOHN H. FARO

Signatory's Position: ATTORNEY - FLORIDA BAR MEMBER

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Thank you,

The TEAS support team

Mon Jun 09 19:42:26 EDT 2014

STAMP: USPTO/BAS-98.238.48.233-20140609194226555768-86304665-

5004fa42bd0fc25a1afa6f07b2886a01d23ed627977f15bf9a6b579677f6e65013-CC-6129-

20140609191724805618

Exhibit “2”



Trademark Electronic Application System (TEAS) filing receipt

1. **YOUR MARK:** Mr. Foamer cartoon characture in costume (stylized and/or with design, mark\_9823848233-101423603\_.\_Mr.\_Foamer\_Drawing\_Resized.jpg)

The literal element of the mark consists of Mr. Foamer cartoon characture in costume.

The applicant is not claiming color as a feature of the mark. The mark consists of Mr. Foamer cartoon character in seasonal holiday Christmas attire (Santa Claus hat).

2. **YOUR SERIAL NUMBER:** We have received your U.S. Trademark Application and assigned serial number '86303800' to your submission. A summary of your application data is provided at the bottom of this message and serves as your official filing receipt. Please keep a copy of this information for your records. All correspondence concerning the application should reference your assigned serial number.

Please read all of the important information below. Not every mark is registrable with the USPTO and we do not refund the application filing fee(s) if a registration does not ultimately issue.

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4. **KEEP YOUR ADDRESS CURRENT IN USPTO RECORDS:** We do not extend filing deadlines due to a failure to receive USPTO mailings/e-mailings. You must update the correspondence and/or owner's address if a postal address and/or e-mail address changes, using the form(s) available at <http://www.uspto.gov/trademarks/teas/correspondence.jsp>.
5. **WARNING ABOUT UNSOLICITED COMMUNICATIONS:** You may receive trademark-related communications from private companies not associated with the USPTO. These communications frequently display customer-specific information, including your USPTO serial number or registration number and owner name, and request fees for trademark-related services, such as monitoring, listings in international publications, and document filing. None of the companies offering these services are affiliated with the USPTO or any other federal agency. All official correspondence will be from the "United States Patent and Trademark Office" in Alexandria, VA, and if by e-mail, specifically from the domain "@uspto.gov." Please consult the "Warning" page on the Trademarks section of the USPTO's website for further information about unsolicited communications and to view representative examples of them. For general information on filing and maintenance requirements for trademark applications and registrations, including fees required by law, please consult [www.uspto.gov](http://www.uspto.gov), contact the [TrademarkAssistanceCenter@uspto.gov](mailto:TrademarkAssistanceCenter@uspto.gov) or telephone 1-800-786-9199.
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10. **SelectUSA:** The United States represents the largest, most dynamic marketplace in the world and is an unparalleled location for business investment, innovation, and commercialization of new technologies. The U.S. offers tremendous resources and advantages for those who invest and manufacture goods here. Through SelectUSA, our nation works to promote and facilitate business investment. SelectUSA provides information assistance to the international investor community; serves as an ombudsman for existing and potential investors; advocates on behalf of U.S. cities, states, and regions competing for global investment; and counsels U.S. economic development organizations on investment attraction best practices. To learn more about why the United States is the best country in the world to develop technology, manufacture products, deliver services, and grow your business, visit [SelectUSA.gov](http://SelectUSA.gov) or call +1-202-482-6800.

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**APPLICATION DATA: Trademark/Service Mark Application, Principal Register**

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C/O FARO & ASSOCIATES,  
1395 BRICKELL AVENUE - SUITE 800  
MIAMI, Florida 33131  
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

International Class 035: Online retail store services featuring car wash equipment and parts thereof

In International Class 035, the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as \_\_\_\_\_, and first used in commerce at least as early as \_\_\_\_\_, and is now in use in such commerce. The applicant is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, .

Specimen-1 [SPE0-9823848233-101423603\_.\_2011\_Chistmas\_Card\_Resized.jpg ]

The name(s), portrait(s), and/or signature(s) shown in the mark does not identify a particular living individual.

The mark was first used anywhere in a different form other than that sought to be registered at least as early as 12/15/2011, and in commerce at least as early as 12/15/2011.

The Mr. Foamer cartoon character is a seasonal or holiday mark. Accordingly, the Mr. Foamer cartoon character is attired in different holiday or seasonal apparel to coincide with a holiday or seasonal event, e.g. thanksgiving, Halloween, etc

For informational purposes only, applicant's website address is: [www.Faro-Law.com](http://www.Faro-Law.com)

The applicant's current Attorney Information:  
JOHN H. FARO of FARO & ASSOCIATES  
1395 BRICKELL AVENUE - SUITE 800  
MIAMI, Florida 33131  
United States

The applicant's current Correspondence Information:  
JOHN H. FARO  
FARO & ASSOCIATES  
1395 BRICKELL AVENUE - SUITE 800  
MIAMI, Florida 33131  
305-761-6921(phone)

305-726-0029(fax)

Johnf75712@aol.com;johnf75712@gmail.com (authorized)

A fee payment in the amount of \$325 has been submitted with the application, representing payment for 1 class(es).

### **Declaration**

The signatory believes that: if the applicant is filing the application under 15 U.S.C. Section 1051(a), the applicant is the owner of the trademark/service mark sought to be registered; the applicant or the applicant's related company or licensee is using the mark in commerce on or in connection with the goods/services in the application, and such use by the applicant's related company or licensee inures to the benefit of the applicant; the specimen(s) shows the mark as used on or in connection with the goods/services in the application; and/or if the applicant filed an application under 15 U.S.C. Section 1051(b), Section 1126(d), and/or Section 1126(e), the applicant is entitled to use the mark in commerce; the applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the goods/services in the application. The signatory believes that to the best of the signatory's knowledge and belief, no other person has the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion or mistake, or to deceive. The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements and the like may jeopardize the validity of the application or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true and all statements made on information and belief are believed to be true.

### **Declaration Signature**

Signature: /JOHN FARO/ Date: 06/09/2014

Signatory's Name: JOHN H. FARO

Signatory's Position: ATTORNEY OF RECORD

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Thank you,

The TEAS support team

Mon Jun 09 11:48:20 EDT 2014

STAMP: USPTO/BAS-98.238.48.233-20140609114820568556-86303800-

5007e25fd872e365cc31d1570fa357529f386e068cd9a9b354b1c49261e3c8840-CC-8869-

20140609101423603425

Exhibit 3”

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**Case No. 13-cv-22541  
TURNOFF, 07/22/2013**

NEW WAVE INNOVATIONS, INC.

Plaintiff,

vs.

JAMES (JIM) MCCLIMOND, MR. FOAMER,  
INC., and CAR WASH EXPERTS INC.

Defendants.

---

**AFFIDAVIT OF JAMES MCCLIMOND IN SUPPORT OF DEFENDANTS'  
OPPOSITION (D.E. 33) TO PLAINTIFF'S MOTION FOR A PRELIMINARY  
INJUNCTION (D.E. 17)**

STATE OF FLORIDA

County of \_\_\_\_\_

James McClimond, being duly sworn, deposes and says:

1. I am the president of Car Wash Experts, Inc. ("Car Wash Experts") and the president of Mr. Foamer, Inc. ("Mr. Foamer").

**Mr. Foamer and Car Wash Experts**

2. Mr. Foamer and Car Wash Experts are both in existence.

3. Mr. Foamer is a separate company from Car Wash Experts and Car Wash Experts is not a predecessor in-interest to Mr. Foamer.

4. Mr. Foamer sells car wash foam generators also known as foamers, car wash foam applicators and other car wash related products manufactured by Mr. Foamer.

**Representations Made by Myself, Mr. Foamer or Car Wash Experts**

16. Mr. Foamer has never alleged on its website, www.mrfoamer.com, that Mr. Foamer provided a comparable car wash foamer to the New Wave Turbo Foam Generator.

17. Mr. Foamer has never told customers that the Mr. Foamer Twist N' Kleen was the same product as the New Wave Turbo Foam Generator.

18. Mr. Foamer has never represented that Mr. Foamer was the East coast address for New Wave.

19. I have never held myself out as being affiliated with New Wave.

20. Car Wash Experts has never held itself out as a company being affiliated with New Wave.

21. Mr. Foamer has never held itself out as a company being affiliated with New Wave.

22. Mr. Foamer has never alleged on its website, www.mrfoamer.com, that Mr. Foamer is a company owned by New Wave or a company affiliated with New Wave.

23. I have never claimed or stated to anyone that I was the inventor of the New Wave Turbo Foam Generator.

24. The posting on Mr. Foamer's Facebook account webpage as shown in Exhibit A to this affidavit, namely "Jim you said you were the inventor," was made by a person named "Dave Wright." (See attached Exhibit "A").

25. I do not know and never met a person named Dave Wright.

26. I have never claimed or stated to anyone that New Wave appropriated the New Wave Turbo Foam Generator from me.

27. Car Wash Experts has not purchased products sold by New Wave for the purpose of promoting its own products.

28. Mr. Foamer has not purchased products sold by New Wave for the purpose of promoting its own products.

**Confidential Information**

29. I never received any confidential or proprietary information about any product sold by New Wave from New Wave.

30. Car Wash Experts never received any confidential or proprietary information about any product sold by New Wave from New Wave.

31. Mr. Foamer never received any confidential or proprietary information about any product sold by New Wave from New Wave.

32. Aside from invoices, the only documents (the "Documents") I have ever received from New Wave were emailed to me by New Wave in two separate emails on or about November 17, 2011, copies of which are attached as Exhibit B to this affidavit (Exhibit "B").

33. The Documents consist of six (6) brochures/advertisement pertaining to the products sold by New Wave, a blank document entitled "customer information sheet," a blank document entitled "account agreement form," a blank document entitled "order form," a blank form entitled "authorized users," a form entitled "order instructions," and a price list. A copy of the Documents is attached as Exhibit C to this affidavit (Exhibit "C").



**The New Wave Christmas Card**

34. I never received an original or copy of the Christmas card sent by New Wave as seen on Exhibit D to this Affidavit. (See attached Exhibit "D," New Wave Christmas card.)

35. The first time I saw a copy of the Christmas card sent by New Wave as seen on Exhibit D was when I was served with a copy of the Motion for a Preliminary Injunction (D.E. 17) filed by New Wave in this action.

36. I did not adopt "Mr. Foamer, Inc." as a company name in an effort to create an association with New Wave.

**New Wave Products and Consumer Recognition**

37. Third parties do not associate the design of the New Wave Turbo Foam Generator with New Wave.

38. Third parties do not know that New Wave is the source of the Turbo Foam Generator.

39. Third parties do not associate the design of the New Wave Elephant Ears Applicator with New Wave.

40. Third parties do not know that New Wave is the source of the Elephant Ears Applicator.

**The New Wave Foamer Designs**

41. The use of the color blue in advertising and promotional materials in the car wash industry is extremely common as the color blue is generally associated with the color of water.

42. The design and shape of New Wave's Turbo Foam Generator is not unique to foamers and is actually common in the car wash industry as shown in the attached photographs evidencing that competitors of New Wave use a similar design and shape for competitive foamers (Exhibit E).

43. New Wave's Turbo Foam Generator is a variation of a commonly seen design for foamers used in the car wash industry.

44. New Wave's Elephant Ears Applicator is a variation of a commonly seen design for foam applicators used in the car wash industry.


45. The configuration of the New Wave's Turbo Foam Generator are functional in nature: (1) the design of the foam insert of the Turbo Foam Generator allows easy disassembly and removal of the insert from the device; (2) the number of the inlet ports on the housing of the New Wave's Turbo Foam Generator is necessary for the device to perform its intended use—one inlet port for the entry of the air/water, the other inlet port for the entry of the chemicals in the generator; (3) the placement of the inlets on the upper part of the device is required in order to deliver the air/water and chemicals from the top portion and allow them to flow downwards and throughout the device until they reach the bottom portion—placement of these inlets anywhere else on the foamer would not allow the foamer to work properly; (5) the alternating elements on the insert of the New Wave's Turbo Foam Generator allow the foam to be created in a more consistent manner; (6) the transparent housing of New Wave's Turbo Foam Generator determines when the device is dirty and needs to be cleaned; and (7) the upper and lower couplings and their location on New Wave's Turbo Foam Generator allow the mounting of an outlet to the device.

50. The term "GENERATOR" is often used in the car wash industry to refer to a device which generates foam.

51. The term "APPLICATOR" is often used in the car wash industry to refer to a device to apply foam to cars in the car wash industry.

52. The term "FOAMER" is often used in the car wash industry to refer to a device which generates foam to be applied to cars in the car wash industry.

53. The terms "ELEPHANT EARS" are used by a company called Sonny's Enterprises Inc., one of the most famous companies in the car wash industry. Sonny's Enterprises Inc. uses the terms "ELEPHANT EARS" in connection with the sale of its drying device in the car wash industry.




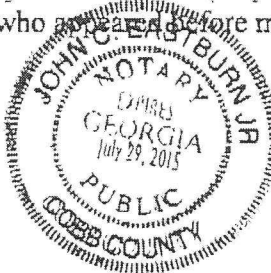
By: James McClimond

GEORGIA  
STATE OF ~~FLORIDA~~  
COUNTY OF COB

Subscribed and sworn to (or affirmed) before me on this 21 day of oct, 2013  
by JAMES MCCLIMOND, personally known to me (or proved to me on the basis of  
satisfactory evidence) to be the person who appeared before me.

(Seal)

  
Signature



5. Car Wash Experts used to sell car wash related products manufactured by third parties.

6. Car Wash Experts stopped selling products sometime around June 2013.

7. Car Wash Experts currently does not sell any products.

**Trademark Use**

8. Car Wash Experts does not use a trademark containing the terms "TURBO FOAM" in connection with the sale of any product or service.

9. Mr. Foamer does not use a trademark containing the terms "TURBO FOAM" in connection with the sale of any product or service.

10. Car Wash Experts does not use a trademark containing the terms "ELEPHANT EARS" in connection with the sale of any product or service.

11. Mr. Foamer does not use a trademark containing the terms "ELEPHANT EARS" in connection with the sale of any product or service.

12. Car Wash Experts does not use a trademark containing the terms "MR. FOAMER" in connection with the sale of any product or service.

13. Mr. Foamer does not use a trademark containing the terms "MR. FOAMER" in connection with the sale of any product.

14. New Wave Innovations, Inc. ("New Wave") does not sell any product or service under the trademark "MR. FOAMER."

15. I have expended approximately over \$30,000.00 in branding my company as "Mr. Foamer, Inc." and any requirement that I rebrand my company will likely cost as much if not more.

## Trademark/Service Mark Application, Principal Register

Serial Number: 86108666

Filing Date: 11/02/2013

### To the Commissioner for Trademarks:

**MARK:** MR. FOAMER (Standard Characters, see [mark](#))

The literal element of the mark consists of MR. FOAMER.

The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, Mr. Foamer, Inc., a corporation of Florida, having an address of  
164 Barbados Drive  
Jupiter, Florida 33458  
United States

requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

International Class 003: car wash cleaning and polishing preparations

Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. (15 U.S.C. Section 1051(b)).

International Class 035: sale of car wash equipment and parts thereof including sale of equipment of others

In International Class 035, the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as 08/10/2012, and first used in commerce at least as early as 08/10/2012, and is now in use in such commerce. The applicant is submitting one(or more) specimen(s) showing the mark as used in commerce on or in connection with any item in the class of listed goods and/or services, consisting of a(n) brochure sent to customers showing use of the mark used in connection with the services.

#### Original PDF file:

[SPEO-1-5015421256-113543527 . Class035.pdf](#)

#### Converted PDF file(s) (1 page)

[Specimen File1](#)

International Class 037: installation and maintenance of car wash equipment and parts thereof

In International Class 037, the mark was first used by the applicant or the applicant's related company or licensee or predecessor in interest at least as early as 11/02/2013, and first used in commerce at least as

**EXHIBIT "1"**

Exhibit “4”

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF FLORIDA  
3 MIAMI DIVISION  
4 CASE NO. 13-22541-CIVIL-COOKE

5 NEW WAVE INNOVATIONS, INC., Miami, Florida

6 Plaintiff, October 29, 2013

7 vs. 10:18 a.m. to 4:43 p.m.

8 JAMES McCLIMOND,  
9 MR. FOAMER, INC., and  
10 CAR WASH EXPERTS, INC.,

11 Defendants. Pages 1 to 286

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12 MOTION FOR PRELIMINARY INJUNCTION  
13 FOR TRADEMARK AND TRADE DRESS INFRINGEMENT  
14 BEFORE THE HONORABLE WILLIAM C. TURNOFF,  
15 UNITED STATES MAGISTRATE JUDGE

16 APPEARANCES:

17 FOR THE PLAINTIFF: JOHN H. FARO, ESQ.  
18 FARO & ASSOCIATES  
19 Post Office Box 490014  
20 Key Biscayne, Florida 33149

21 FOR THE DEFENDANTS: ADAM PALMER, ESQ.  
22 SCHOEPP & BURKE  
23 4651 North Federal Highway  
24 Boca Raton, Florida 33431  
25 -and-  
STEVEN GREENBERG, ESQ., and  
ISABELLE JUNG, ESQ.  
CAREY, RODRIGUEZ, GREENBERG,  
O'KEEFE, LLP  
7900 Glades Road  
Suite 520  
Boca Raton, Florida 33434



1 THE COURT: Your client is raising his hand.

2 MR. FARO: I know. I don't want to consult. I don't  
3 want to consult.

4 BY MR. FARO:

5 Q. You indicated earlier that the Mr. Foamer designation, for  
6 lack of a better term, was not used on any product. Is that  
7 correct?

8 A. That is correct.

9 Q. Do you consider the Mr. Foamer designation a valuable  
10 property right?

11 A. My corporate name, yes. Absolutely.

12 Q. What about the use of that Mr. Foamer name in your business  
13 in terms of promoting the business?

14 A. Yes. It's very important.

15 Q. Do you consider the Mr. Foamer name as your corporate  
16 identity?

17 A. Yes, I do.

18 Q. So is it fair to say that it represents your company as a  
19 distributor of products such as the Twist 'n Foam generator?

20 A. It's the name of our company. Yes.

21 Q. But it's used -- you're recognized as a distributor through  
22 that name of these products?

23 A. No. Our distributors are not recognized over --

24 Q. You are recognized as a distributor of commercial car wash  
25 products on the Mr. Foamer name -- under the Mr. Foamer name?

1 A. No. As I said, I we want on Google to three or four  
2 different trademark --

3 Q. I'm just asking these questions.

4 A. Sure. Absolutely. And I'm answering. Yes, sir.

5 Q. Now, when you -- do you consider Mr. Foamer a service or  
6 trademark of your company?

7 A. We don't sell Mr. Foamer --

8 MR. PALMER: Your Honor, I'm going to object to the  
9 extent that it calls for a legal conclusion.

10 THE COURT: I'll sustain it.

11 BY MR. FARO:

12 Q. Do you have any intellectual property rights covering any  
13 of your products?

14 A. We currently have a provisional patent filed in, I believe,  
15 April of this year for the Twist 'n Kleen generator.

16 Q. Which embodiment?

17 A. What's that?

18 Q. Any particular embodiment? Is there some particular  
19 embodiment?

20 MR. PALMER: Objection, your Honor.

21 THE WITNESS: It's confidential.

22 THE COURT: What's an embodiment?

23 MR. FARO: The embodiment being the improved  
24 configuration or the original configuration.

25 THE COURT: Counsel?